



Rochester Hills

Minutes

Zoning Board of Appeals

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Home Page:
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Chairperson Ernest Colling, Jr.; Vice Chairperson Kenneth Koluch
Members: Deborah Brnabic, Bill Chalmers, Dane Fons, Dale A. Hetrick, Michael McGunn

Wednesday, December 14, 2016

7:00 PM

1000 Rochester Hills Drive

CALL TO ORDER

Chairperson Colling called the Regular Meeting to order at 7:00 p.m. in the Auditorium.

ROLL CALL

Present 5 - Deborah Brnabic, Bill Chalmers, Ernest Colling, Dale Hetrick and Kenneth Koluch

Absent 2 - Dane Fons and Michael McGunn

Also Present: Ed Anzek, Director of Planning
Sandi DiSipio, Recording Secretary

The Board welcomed new member, Bill Chalmers, who introduced himself and gave a summary of his background.

APPROVAL OF MINUTES

[2016-0545](#) July 13, 2016 Regular Meeting Minutes

A motion was made by Koluch, seconded by Hetrick, that this matter be Approved as Presented. The motion carried by the following vote:

Aye 5 - Brnabic, Chalmers, Colling, Hetrick and Koluch

Absent 2 - Fons and McGunn

COMMUNICATIONS

Planning & Zoning News - July through October, 2016 editions

PUBLIC COMMENT for Items not on the Agenda

No public comment was heard.

NEW BUSINESS

[2016-0546](#) **PUBLIC HEARING - FILE NO. 00-030**

Location: 71 N. Livernois, located on the west side of Livernois, north of

Walton Boulevard, Parcel Identification Number 15-09-476-046, zoned R-2 (One Family Residential), and known as Avon Prairie House.

Request: An Amendment to a Use Variance granted on September 25, 2000 with findings and conditions, pursuant to Section 138-2.408 (Use Variance) of the Rochester Hills Code of Ordinances, to modify permitted uses and hours of operation.

Applicant: Donald Westphal
71 N. Livernois
Rochester Hills, MI 48307

(Reference: Staff Report dated December 6, 2016, prepared by Edward P. Anzek, Director of Planning, and associated documentation were placed on file in the Planning Department and by reference becomes part of the record hereof.)

Chairperson Colling read the request for the record, and asked the applicant to come forward and provide a summary of the request.

Chairperson Colling commented there is an email contained in the packet from Jan Fleming, 1361 New Life Lane, a neighbor of the subject site, who is not in favor of increased hours or a modification of the use variance without conditions. A letter was also received from Douglas and Shirley Metzler, 1311 New Life Lane, neighbors who are opposed to modifications to the use variance.

Mr. Donald Westphal, 71 N. Livernois, property owner and applicant, introduced himself and gave a PowerPoint presentation of the history of the building and site, the current situation, and then summarized his modification request. The structure was built in 1927, and retains the original asbestos cement shingle roof. When Oakland County Road Commission owned the property, as they had to purchase it when Livernois Road was lowered, it was inaccessible from Livernois. It was vacant and boarded up for quite some time until Mr. Westphal purchased it in 2000. The presentation contained before and after photos of the property. The approved site plan showed parking surrounding the building. To the west and north, there was a 50 foot buffer zone that was required as a part of an earlier agreement between the Road Commission and the residents of the adjacent subdivision - that the Road Commission would build a fence along the lot line and screen with evergreens if the Homeowners Association would agree to not oppose the owner's attempt to rezone the property to commercial. Mr. Westphal indicated the fence was on the property prior to his purchase. Subsequently, the Road Commission tried to rezone the property, but individuals in the subdivision opposed it. The property was zoned R-2, One Family Residential, when purchased by the owner, who researched what vehicle to use in developing an adaptive reuse of the building. The Planning Department and the owner thought a use variance, which hadn't been granted in the City previously, was a way to make this happen, so that an office use was allowed within an R-2 residential zoning district. Mr. Westphal explained the steps that previously went to the front door were removed and graded all the way down to the sidewalk so that a retaining wall could be built along the front of the property and provide for the driveway and handicapped ramp. Mr. Westphal then explained before and after photos of the interior. He added that shortly

after the historic restoration was complete, he was proud to receive HDC's Earl Borden Award for the restoration efforts.

Mr. Westphal then pointed out on a photo where 1361 New Life Lane is located, the residence that sent an email in opposition, and explained where headlights shine when cars turn the corner to park. During the summer, the lights are not bad because of foliage, but during the winter, it's different. It was not a problem initially because the evergreens were small and made a good screen at the lower level, but the trees have grown and there is some light leaving the subject site at this location. He recognizes their concerns and would be happy to cooperate by providing an arborvitae screen to prevent the headlight spray.

Regarding maintaining the fence, Mr. Westphal indicated the fence was on site when he purchased the property. He doesn't feel any fence on the property, where the existing fence is located, would prevent the view from the subject property to the adjacent properties. He believes he has done his part in terms of maintaining the fence. He has replaced bad fence posts, and tightened fence slats. He feels he has been a good neighbor and has done his best to make his investment good for the City and the property owner.

Chairperson Colling mentioned both letters received relative to this case were from residents located on New Life Lane, and asked if this street was part of the Homeowners Association that had the initial agreement with the Road Commission regarding the fence. The applicant replied yes. Mr. Colling then asked if the two residents who wrote the letters were part of the Homeowners Association when the agreement was entered into. Mr. Westphal can't answer that question. Mr. Colling explained his point is that if the property owners were part of the Homeowners Association when they entered into an agreement with the Road Commission about the fence, these homeowners would have had the opportunity then to voice an opinion. As far as repairs to the fence, Mr. Westphal has responsibility to maintain the fence, and that he is offering to block the light for one of the neighbors is a good faith gesture. If the Homeowners Association entered into an agreement about the fence, there is no reason to change that.

Mr. Anzek indicated he drove the subject site and the 1361 New Life Lane residence can clearly be seen. He spoke with Mr. Westphal about remedial action to offset this situation.

Mr. Koluch stated that both letters received from the neighbors focused on the views and headlights rather than the requested additional uses. He asked if the arborvitae screen on the northwest side of the site would solve the problem that the fence was supposed take care of. Would the screening make the fence obsolete?

Mr. Westphal explained there is a significant slope in the area of the fence. The top of the fence is below the level of the curb in the parking lot. It would require a 20 foot high fence to take care of the light screening that would be required and he is not in a position to replace the existing fence. He is repairing it as needed.

Chairperson Colling commented he remembers the fence being discussed as

part of the original use variance; the purpose being property separation rather than screening. He would rather see a green screen take care of headlight spray than a fence.

Mr. Anzek agreed and pointed out the Planning Commission prefers an arborvitae screen over a fence or masonry wall for developments.

Mr. Westphal indicated the arborvitae screen will take care of the light spray. He proposes the plantings be at least six feet tall to begin with, and planted at the top of the slope. He pointed out on a photo where they will be planted.

Chairperson Colling asked for clarification of the proposed changes to weekend hours of operation.

Mr. Anzek explained when the staff report was written, hours of operation were not clarified, so that discussion will take place tonight. The applicant was in the office today, and staff spoke with him about the hours. Mr. Westphal had indicated Sunday evening hours were not critical, additional hours are needed to cover occasional afternoon hours - 9:00 or 10:00 AM to 6:00 PM would be fine for Sundays. On all other days, it is requested that hours of operation be until 9:00 PM.

Mr. Westphal explained he has several clinical psychologists in the building whose practice deals with families with children, and evening hours are important because the children are in school during the day. The normal business hours of 9:00 AM to 5:00 PM won't work for these low intensity uses. The evening hours do not create a parking issue because most of the other office uses are usually gone at 5:00 PM.

Mr. Colling commented in the low intensity services, clinical psychologists, licensed massage therapists and beauty salons are listed, but medical, dental or other health care services that can generate excessive traffic are not included. He understands the clinical psychologists and massage therapists having low impact and low traffic, but questions the beauty salon. Normally, there would not be a single beautician in a salon, but two to four, and this use could potentially generate a lot of traffic. Mr. Colling said if he were to approve these amendments, he would strike beauty salons as a permitted use.

Mr. Westphal clarified the beauty salon has been in the carriage house for over a year and it has never created a traffic problem. There are one or two beauticians maximum, and the parking lot has never been completely full. The salon's customers make appointments.

Chair Colling added if he allowed beauty salons, and there is space available in the office building, it's possible another salon with four or more beauticians and nail technicians could rent the space, and there could be significant traffic. What exists on site now is working, but that's not the norm when it comes to salons.

Ms. Brnabic asked how many beauticians are in the salon, to which the applicant replied two. She asked if nail services were offered. Mr. Westphal

indicated no. She feels that generally, salons do generate traffic, but the subject salon is small. Future operations may not be small.

The applicant offered a possible solution of limiting the total number of beauticians on the property to two. Chairperson Colling asked Mr. Westphal if he would accept a condition to allow a maximum of two or three beauticians and to not offer nail services to limit the traffic. Mr. Westphal was agreeable to this condition.

Ms. Brnabic asked if the Board is changing the intent of the original use variance by approving these amendments, because it was specific to being limited to professional office uses. This concerns her because we are allowing other uses, but being very specific with them. We know what is intended now, but does it change the original use.

The question was asked if the beauty shop was the original tenant in the carriage house. The applicant responded no. The carriage house was originally occupied by one of Mr. Westphal's partners who moved out of state, and was replaced by an attorney for a short period. Then the space was vacant and the owner was having difficulty in renting it out. At one time, the entire second floor of the building was occupied, but then the recession hit, the tenants left and he needed to rent out the space. Mr. Westphal explained he understands the Board's concerns.

Mr. Colling indicated he was just trying to figure out when the salon came in, as he didn't know about it until tonight. Staff has stated there has never been a complaint lodged about the operation. He is concerned that if another salon rented space, there might be traffic issues. He would like to put some type of limit on this usage. Other than that, the use seems fair.

Mr. Anzek appreciated what the Chair and Ms. Brnabic brought up about the two beautician chairs. The way it's written, it doesn't limit it to two chairs, the applicant could rent the entire building out to a beauty shop. When the original use variance was discussed the concern was that staff and the ZBA wanted the project to be successful, but didn't want a lot of traffic that creates an adverse impact on the neighborhood. We've seen doctors and dentists have high turnover rates and patients in and out all day, so this use was originally restricted. A clinical psychologist is a low intensity use and needs those extra hours - this use was not originally considered. As this has evolved into a well run program, these types of uses are satisfactory and meet the intent of the low impact to the neighborhood.

Mr. Colling agrees with psychologists and massage therapists being low impact tenants, but still questions beauty salons. Mr. Anzek stated a condition could limit this activity.

The Chair noted a couple of residents arrived at 7:39 p.m., and asked if they would like to speak on this matter.

Mr. William Musser, 22517 Silver Creek Lane, Rockwood, MI 48173 came forward, introduced his wife, and explained he owns Oriental Massage Therapy

at the corner of Livernois and Walton in the Lucky Plaza. He is here for free enterprise, but only when all businesses play the same rules. The subject building is not zoned for this type of business, and he doesn't think the zoning can be changed after a business has been established. In May 2016, he asked staff if a massage center could be opened at 71 N. Livernois, and was told no. He then found copies of ads for Lena's Spa, and again asked staff why this business was allowed at the subject site. He believes inspectors came out the next day and shut the business down. In late May, he received an email from staff indicating the Director would have to make a call on if the use was allowed. In October, he met with Mr. Anzek about Lena's Spa operating at 71 N. Livernois, who said the zoning commission would have to make a decision on whether to change the zoning. Mr. Musser is in opposition to amendments to the use variance. It should be a fair playing field for all parties. He followed all ordinances for his property in order to open the business and receive a Certificate of Occupancy. The Spa is still operating. He believes it is not fair and unethical to open a business in a building that is not properly zoned for the use, and then retroactively modify the zoning to fit the business. He has determined that the subject property has 24 employees and customers, and there is only 17 parking spaces. This should be a violation of City ordinance of building occupancy. He asked the board to deny the approval of the requested modifications by Mr. Westphal.

Chairperson Colling pointed out the applicant is following the law as he has a use variance for the subject property. The previous owner, Oakland County Road Commission, tried to have the property rezoned as commercial, and that was turned down. The next step is for the owner to apply for a use variance, which he did. The applicant is applying for a modification to a use variance whose intent was for low impact businesses. Specific businesses were not spelled out. The applicant is asking to expand/clarify what other businesses besides what was originally approved would be allowed.

Mr. Anzek clarified he met with Mr. Musser, then spoke with Mr. Westphal. After discussion, staff determined Mr. Westphal needed to come back before the ZBA to ask for an amendment to the use variance for the massage use. Mr. Anzek explained to Mr. Musser that staff looks at this situation as a use matter - if it's low intensity or a traffic generator. It is the ZBA's prerogative to amend a use variance. Staff has not received any complaints from any neighbors.

Mr. Colling noted the intent of the use variance was to keep the property from being demolished and to allow it to be used commercially with low impact businesses. What the Board has to determine is what additional low impact businesses could be run out of the subject site. By low impact, the Board is not talking about impact in terms of competition, but visitation to the property.

Mr. Hetrick remarked that the Board is on the crux of creating a use variance that has some limitations for the number of beauticians, but he feels the same thing should apply to the massage therapist business as well - that it has to be a one or two person business. Otherwise, the traffic volume would be increase.

Chair Colling said the Board also needs to address one more issue, i.e., there is

going to come a point in time where there will be too many businesses in the building that will generate impact to the neighborhood because there will not be enough parking spaces to handle the employees and the traffic generated by the building. Somewhere along the line, the Board needs to make a determination as to the number of businesses this building can support and not impact the neighborhood.

Mr. Hetrick suggested the statement "can generate excessive traffic as determined by the Planning Director" gives some leeway for staff to determine what the traffic volume would be and if there would be an impact.

Mr. Colling suggested that any leases or new businesses or changes to the number of business that would increase the number of employees should be discussed with staff for an impact assessment.

Mr. Westphal does not have problem with this condition. He has done everything possible to make his operation viable and live within the rules of the City. For example, there are four clinical psychologists in the building, and there may be one day a week when more than two of them have clients at the same time. Very seldom do their appointments overlap and they are actually less impactful than when there were eight employees on the second floor. Times have changed, and he is trying to keep a viable business in these times. His goal is to try and do something that keeps the business going, and recognizes the fact that he's done a good job in trying to promote a piece of property that was an eyesore and to make it work. Parking has never been a problem.

Mr. Hetrick commented the Board wants to help the applicant meet his goals in terms of occupancy of the business, but wants to get conditions that best suit traffic and the ability to occupy the space. He asked the applicant if he has a problem with a condition of Sunday hours of 9:00 AM to 4:00 PM because the headlight spray would be diminished.

Chairperson Colling added that headlight spray is only an issue from October to March.

Mr. Hetrick suggested adding a condition #12 about the arborvitae screening along the northwest portion of the subject property to reduce headlight visibility on the adjoining properties.

Mr. Westphal is fine with this condition as long as the screening is not expected along the entire north boundary of the parking lot, and only in the area where the headlight spray is a problem.

Staff offered to monitor the screening to make sure the problem is taken care of.

Ms. Brnabic asked staff for clarification on uses. She doesn't have a problem with a low impact beauty shop that has two beauticians. She keeps going back to how the original use variance was written, in that it was very specific and was based on professional office use. She feels we are adding low impact business, but the way the use variance was written was very specific to professional office

uses. Beauty shops and massage businesses are not considered professional office. She doesn't have an objection, only that we are adding to the use variance on what may be permitted because it is generating lower traffic.

Mr. Anzek feels the beauty shop use should be limited to two chairs. A condition could also be added to prohibit walk-in clientele, which can create an unforeseen amount of traffic.

Mr. Colling suggested that professional services might include a licensed masseuse or a beautician because they must be licensed in order to practice. It could be limited to two licensed professional services that operate on appointments only. That would take care of the walk-ins and traffic.

Mr. Anzek said the issue the Board has with the parking is almost a self-policing matter - by the time staff becomes aware of an issue, there is already a problem. The applicant has successfully run his business and not chased clients out or lost clients due to parking issues. Mr. Anzek feels that Mr. Westphal would be overseeing this issue himself, and offered a condition for consideration. Staff could put the site on a "watch list", so that the code officers could check on the site whenever they are in the area.

Ms. Brnabic commented she still feels that massage therapists and beauty salons are not office uses as the use variance calls for. The Board is adding additional uses, but they are not office uses. She does not have an objection with what the applicant wants to do, unless in the future it turns into something that would generate a lot of traffic. It would then be a different situation.

Chairperson Colling indicated that in the first condition, it states staff must approve any new tenant to ensure conformance to the use condition.

Mr. Anzek then commented the permitted uses condition includes the words low intensity personal services, so this is in addition to the professional office uses.

The Chair called for a recess of the Board at 8:00 p.m.

The Commission reconvened at 8:12 p.m.

MOTION by Koluch, seconded by Hetrick, in the matter of File No. 00-030, the Zoning Board of Appeals **APPROVES AN AMENDMENT** to Condition #1 and Condition #3 of the previously approved Use Variance (granted on September 25, 2000, and amended on July 11, 2005) for 71 N. Livernois, commonly known as the Avon Prairie House, Parcel Identification Number 15-09-476-046, to read as follows:

Condition #1: Use - General. Permitted uses in the existing structure on the subject site shall be limited to professional office uses, including by example, the offices of an attorney, architect, landscape architect, engineer, or other design professional, low intensity licensed professional and personal services that operate by appointment only, provided personal service providers shall be limited to two licensed practitioners, but not including medical, dental, or other healthcare related office uses that can generate excessive traffic. In addition,

due to the nature and configuration of the subject site and existing structures, as well as the anticipated layout of required site improvements, the permitted professional office uses shall be limited to exclude any use that would generate excessive customer traffic, to be determined by the Planning Director. Examples of such excluded uses would include, but not be limited to, real estate sales, insurance, financial planning, and interior decorating office uses. Administrative approval by the Planning Director or designee of any new tenant or occupant of the existing structure shall be required to ensure conformance to this condition. Appeals from the decision made by the Planning Director or designee in this regard may be made to the Zoning Board of Appeals consistent with Zoning Ordinance requirements for appeals from administrative decisions.

Condition #3: Use - Operating Hours. Use of the subject site and the existing structures shall be generally limited to normal business hours (7:00 AM to 9:00 PM, Monday through Friday, 7:00 AM to 6:00 PM on Saturday, and 9:00 AM to 6:00 PM on Sunday), with occasional late night use to be allowed, with the intent of this Condition being to prohibit 24-hour or other extensive use incompatible with adjacent residential areas.

Additional Condition to the original Use Variance granted on September 25, 2000

Condition #12. An arborvitae screen shall be installed and maintained on the northwest side of the subject property in order to reduce headlight visibility on the adjoining residential properties to the satisfaction of the Planning Director.

A motion was made by Koluch, seconded by Hetrick, that this matter be Approved. The motion carried by the following vote:

Aye 5 - Brnabic, Chalmers, Colling, Hetrick and Koluch

Absent 2 - Fons and McGunn

Mr. Westphal thanked the Board for granting him the conditions that will allow him to continue to be successful in his venture at 71 N. Livernois. He takes great pride in the building and believes the City does as well. He appreciates the Board's help in continuing this relationship.

The Board wished Mr. Westphal the best of luck and is looking forward to another 15 years without any complaints.

ANY OTHER BUSINESS

Merry Christmas and Happy New Year to everyone. No other business was brought forward for discussion.

NEXT MEETING DATE

The next Regular Meeting is scheduled for January 11, 2017

ADJOURNMENT

Chairperson Colling adjourned the meeting at 8:18 p.m.

*Ernest W. Colling, Jr., Chairperson
Zoning Board of Appeals
City of Rochester Hills*

Sandi DiSipio, Recording Secretary